UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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RONALD MELTON et al.	:	Case No.: C-1-01-528
	:	
Plaintiffs,	:	Judge Spiegel
	:	
v.	:	
	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO et al.	: :	
	:	
Defendants.	:	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE AND JOIN CLASS ACTION PROCEEDINGS

Defendant Jonathan Tobias, M.D. respectfully requests that the Court deny Plaintiffs' Motion to Consolidate and Join Class Action Proceedings, or, in the alternative, delay its decision on that motion until it can address Dr. Tobias's motion for summary judgment on grounds of qualified immunity.

As the Court no doubt recalls, this is the second motion to consolidate filed in this case. More than fifteen months ago, Defendants Hamilton County, Ohio, Robert Pfalzgraf, M.D., Gary Utz, M.D., Terry Daly, and Rhonda Lindemann (the "County Defendants") moved to consolidate this action with Chesher v. Neyer, C-1-01-566. (Doc. #44.) Plaintiffs opposed the motion (see docs. #48, 59), which the Court eventually granted (see doc. #63).

Now, almost a year after the Court denied the County Defendants' motion to consolidate and a mere ten days before the close of discovery, Plaintiffs have reversed course and moved to consolidate this lawsuit with Chesher. Plaintiffs attempt to explain that their last-second change of heart occurred after they deposed Dr. Tobias on January 16, 2004:

> Following the deposition of Defendant Tobias, Plaintiffs have made the determination that it would be to the advantage of all parties and the Court for them to "opt" into the class action proceedings and [to have] their action consolidated with the pending class action proceedings. The judicial economy as well as the consolidation of resources on both the part of the Class Representatives, Plaintiffs, and Defendants support Plaintiffs' request herein.

(Doc. #79 at 1.) This explanation is mystifying, however, because nothing changed as a result of the most recent deposition of Dr. Tobias. For one thing, Dr. Tobias's testimony on January 16, 2004, added nothing substantive to his deposition testimony in the Chesher case, which he provided on May 29 and June 25, 2003. Indeed, Dr. Tobias's most recent deposition testimony only clarified what was clear before – this case is entirely different than Chesher, both legally and factually, and Plaintiffs' claims are without merit.

Federal Rule of Civil Procedure 42(a) permits consolidation only "[w]hen actions involving a common question of law or fact are pending before the court." See 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2382 ("Consolidation must be denied if there is no common question of law or fact tying the cases together."). This case should not be consolidated with Chesher because, despite the fact that both cases involve incidents where bodies were photographed at the Hamilton County Coroner's Office, they do not share common questions of law or fact.

On one hand, this suit involves a single photograph of a corpse taken by Dr. Tobias in the course of his official duties as a pathology fellow at the Hamilton County Coroner's Office. On the other, Chesher involves numerous photographs of corpses taken by Defendant Thomas Condon before and during various autopsies. Some of these photographs involved "props" placed on or near the bodies; some did not. None of them were taken for official use by the Coroner's Office.

Chesher requires the resolution of numerous factual issues, such as whether Mr. Condon was granted permission to take photographs, the scope of that permission, and to what extent the various defendants were responsible for Mr. Condon's activities. As explained in Dr. Tobias's motion for summary judgment, however, no questions of fact remain in this case. Likewise, Chesher and the instant case involve distinct issues of law. Among the legal issues in Chesher are whether Mr. Condon violated the constitution when he viewed, photographed, and placed props next to bodies at the Coroner's Office; whether the County Defendants violated the constitution if they permitted him to access the bodies in question; and whether Dr. Tobias violated the constitution if he believed that the County Defendants had authorized Mr. Condon to access those bodies. Here, the legal issue is different: whether Plaintiffs' constitutional rights were violated when Dr. Tobias, an employee of the Coroner's Office acting within the scope of his official duties, took a photograph of Mr. Melton destined for the Coroner's Office's official files.

While these cases both arose from incidents at the Hamilton County Coroner's Office, they do not share common questions of law or fact. Therefore, consolidation is impermissible under Rule 42(a). See St. Paul Fire & Marine Ins. Co. v.

King, 45 F.R.D. 519, 520 (W.D. Okla. 1968) (refusing to consolidate two cases arising from same auto accident, where one case involved question of whether use of automobile was permitted and the other asked whether the use of automobile was within scope of employment).

Additionally, consolidating the two cases at this stage, without first ruling on Dr. Tobias's motion, would greatly prejudice Dr. Tobias. According to the United States Supreme Court, Dr. Tobias is entitled to a ruling at the earliest opportunity on his motion for qualified immunity. See Saucier v. Katz, 533 U.S. 194, 200-01 (2001). If the Court were to consolidate this action with Chesher without ruling on that motion, Dr. Tobias essentially would deprived of the benefit of that doctrine. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("like an absolute immunity, [qualified immunity] is effectively lost if a case is erroneously permitted to go to trial"). This is neither just nor necessary in light of the fact that Dr. Tobias's motion for summary judgment already is pending before the Court.

Finally, concerns of judicial economy and fairness to the parties counsel against consolidation. See 9 Federal Practice & Procedure § 2382. Plaintiffs asked the Court more than a year ago to deny the County Defendants' motion to consolidate because they felt that consolidation would be to their detriment:

> Consolidation will cause [Plaintiffs] to be disadvantaged. They nor their counsel should not [*sic*] be compelled to suffer through hours of discovery not related to their claims. They should not be compelled to suffer through expensive and unproductive discovery. **To force such would be a disservice to Plaintiffs.**

(Doc. #48 at 3 (emphasis added).) Plaintiffs' arguments apply with equal, if not greater, force now, except that it is now Dr. Tobias and the other Defendants who will be prejudiced by consolidation.

This suit has lingered for three years. Discovery is finally complete. Defendants have filed motions for summary judgment. A trial is set for July 6, 2004. Meanwhile, no dates for the end of discovery, dispositive motions, or a trial have been set in Chesher. A hearing on a motion by the Chesher Plaintiffs for the approval of class notice and the establishment of such a schedule will not even take place until March 17. In addition, the parties in Chesher are engaged in a heated dispute over discovery issues wholly irrelevant to this case. (See Chesher v. Neyer, C-1-01-566, doc. #149 (order denying motion to quash depositions of various attorneys in Hamilton County Prosecutor's Office).)

The difference between the procedural posture of this case and Chesher would minimize any benefit that might otherwise be gained from consolidation. The parties in the instant case would have to wait for the resolution of the various unrelated issues in Chesher, all while summary judgment motions in this case are pending. Moreover, consolidation would muddle the essentially simple facts of this suit with the notably more complex issues involved in Chesher. Indeed, it is difficult to see how any of the parties even would benefit from consolidation with Chesher, except that Plaintiffs might be able to ride the coattails of that class-action and receive some compensation for their unmeritorious claims.

For these reasons, Dr. Tobias urges this Court to reject Plaintiffs' obvious strategic maneuver and deny Plaintiffs' motion to consolidate. In doing so, the Court would be able to deal with this relatively simple case on its merits quickly and efficiently, particularly in light of Dr. Tobias's motion for summary judgment. In the alternative, Dr. Tobias requests that the Court at least delay its ruling on Plaintiffs' motion to consolidate until it has ruled on Dr. Tobias's motion for summary judgment.

Respectfully submitted,

/s/ Glenn V. Whitaker

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served by electronic mail on all counsel of record on this 4th day of February, 2004.

/s/ Glenn V. Whitaker
Glenn V. Whitaker